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BEFORE THE UTAH BOARD OF OIL, GAS AND MINING

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| Utah Chapter of the Sierra Club et al.,<br>*Petitioners,*<br><br>vs.<br><br>Utah Division of Oil, Gas and Mining,<br>*Respondent,*<br>*and*<br>Alton Coal Development, LLC,<br>*Respondent/Intervenor.* | Division of Oil, Gas and Mining's Response Brief re: Alton Coal's Petition for Attorney Fees<br><br>Docket No. 2009-019<br>Cause No. C/025/005 |

The Utah Division of Oil, Gas and Mining submits this brief in response to Alton Coal Development's Opening Brief in Support of Fee Petition.

## INTRODUCTION

This brief responds to the most recent petition in Alton Coal Development's still-ongoing suit for attorney fees against Sierra Club, et al. At its core, Alton's renewed petition turns on the standard of frivolousness under Board Rule B-15; however, Alton's brief disregards the Board's well-articulated description of the standard for fee shifting and the burden required.

Contrary to Alton's footnoted suggestion[1] that the Division be excused from taking part in this argument, the Division participates for three reasons. First, the Division and the Board must administer the coal program together. Second, this matter is of first impression, where the Board will draw the line between proper public participation and punishable harassment, and the Division is charged with advising the Board on such issues by law. Finally, having defended Alton's coal permit before both the Board and the Supreme Court, counsel for the Division are intimately acquainted with the legal and factual claims at issue here.

The Division therefore offers the Board three main sections in this brief. First, the Division sets forth a comprehensive background, including an analysis of the public participation built into the Utah Coal Act. The background also includes a robust explanation of frivolousness under Utah and federal law. Second, the Division

[1] Opening Brief in Support of Fee Petition and Commencement of Discovery (Objective Standard-Frivolousness) at 3 n. 3, June 8, 2015.

analyzes the law as applied to the facts and argument presented in the merits phase of this case. Third, the Division concludes that Sierra Club's original permit challenge was proper under the Utah Coal Act, none of the claims were frivolous, and the Board should finally end this saga by denying Alton's petition for fees.

## BACKGROUND

This background section provides information essential to understanding the complex nature of Utah's coal program.

***Coal mining, cooperative federalism, and Utah's primacy.*** Utah's modern regulation of coal mining began when the Utah Legislature passed the Coal Mining and Reclamation Act (hereinafter the Coal Act). Through the Coal Act, the Utah Legislature gave regulatory authority over coal mining to the Division and the Board and charged the Division with advising the Board on coal issues. *See* Coal Mining and Reclamation Act, Utah Code § 40-10-2. Also through the Act, Utah took primacy from the federal government in the arena of coal mining.

However, the State's primacy remained subject to the minimum requirements established by Congress in the Surface Mining Control and Reclamation Act (SMCRA). As the Utah Supreme Court explained, "SMCRA took a 'cooperative federalism' approach to surface coal mining by establishing minimum national standards and encouraging the States" to enact their own coal mining laws. *Utah Chapter of the Sierra Club v. Bd. of Oil, Gas, & Min.*, 2012 UT 73, ¶ 41, 289 P.3d 558 (ellipses, brackets, and quotation marks omitted). Under this

cooperative approach, federal law establishes a baseline—SMCRA requires that Utah's laws be "no less effective than the federal implementing regulations." *Id.*

The major components of the baseline were codified in 1977 when Congress enacted SMCRA as part of its broad environmental reform. In SMCRA, Congress required the same robust opportunities for public involvement as it did in the other major environmental statutes like the Clean Air Act and Clean Water Act. Because of Congress's cooperative federalism approach to regulation, federal law and materials are highly persuasive in delineating the minimum standards for public participation because state standards must be at least that high.

***Public participation under Utah law.*** Among other delegations of power in the Coal Act, the Utah Legislature gave the Board a clear directive: "assure that appropriate procedures are provided for the public participation in the development, revision, and enforcement of [the Act]." Utah Code § 40-10-2(4). In satisfaction of that directive, the Utah Coal Act empowers citizen involvement in regulation through a broad array of methods.[2]

The asymmetrical fee-shifting provisions in Rule B-15 are one such method of encouraging public participation. For instance, Rule B-15(b) allows a public party to receive attorney fees from the State any time

[2] Indeed, one commentator concluded that SMCRA gives citizens the broadest rights to participate in administrative and judicial proceedings of any environmental statute. Mark Squillace, *The Strip Mining Handbook* 36 (2009).

their legal action furthers the purpose of the Act, even if their permit challenge ultimately fails. In this way, the Coal Act makes it uncommonly easy for a public party or citizen group to obtain fees from the government. This is by design. The very purpose of the low standard under Rule B-15(b)—which departs radically from the general American rule against fee shifting—is to encourage public participation by compensating public parties for the cost of helping the Division administer the Coal Act.

As Justice Scalia observed, the "provision for recovery of the costs of litigation" has the "obvious purpose of … encourage[ing] enforcement by so-called 'private attorneys general.'" *Bennett v. Spear*, 520 U.S. 154, 165 (1997) (discussing the Endangered Species Act, but equating all the major environmental statutes, including SMCRA, in this regard). Justice Scalia also compared environmental statutes like SMCRA to the Civil Rights Act, both of which "**rely on private litigation** to ensure compliance with the Act[s]." *Id.* at 166 (emphasis added).

Conversely, the Coal Act does not rely on a permittee's participation and does not encourage it (presumably because permittees have their own motivation to participate). The Board therefore, in accordance with federal law, made it substantially more difficult for a permittee to win attorney fees from a public party under Rule B-15(d), at issue here. This is also by design; It is in accord with the Utah Legislature's policy preference and makes sense in context.

The only point of this part of the Rule—shifting the cost of defending a permit onto a public party—is to protect permittees from vexatious harassment. It is not meant to punish public parties for exercising their statutory right to participate in the process.

Congress explained the purpose of fee shifting when it set the federal minimum in SMCRA: "an award [of attorney fees] may be made to a [permittee] **only if** the plaintiff has instituted the action **solely** 'to harass or embarrass' the defendant." H.R. Rep. No. 95-218, at 90 (1977), *reprinted in* 1977 U.S.C.C.A.N. 593, 627 (emphasis added). Only if. Solely. These words do not suggest an easy path for permittees like Alton to get fees.

The Board adopted this reasoning when it copied Rule B-15's language from the federal regulation verbatim. The policy choice is clear: Awarding attorney fees against a public party is an extraordinary measure that is only available against citizen claims that were frivolous and had no purpose other than harassment. The threat of fees must not dissuade the very public participation that the Legislature found critical to a properly functioning Coal Act.

***The shifting burdens of the permitting process***. To obtain a permit, an operator must show the Division that its application satisfies all the requirements of the Utah Coal Act. The Act, therefore, places the initial burden on the operator to make its case for a permit. Once the operator meets that burden and the Division approves the permit, the burden

shifts onto potential challengers because the permit is presumptively valid.

Thus, a challenger petitioning for review of the permit must overcome that presumption. To do so, the challenger must review the entire application and record of decision, and then set forth the reasons that the Division failed to comply with the law. Because the burden has shifted, the challenger must prove that the Division's approval was arbitrary or capricious or contrary to law. That is, it is not enough to show that the Division made an error; rather, a challenge only succeeds when it is more likely than not that the Division's decision was arbitrary or capricious or contrary to law. These are not easy standards for a permit challenger to overcome.

This standard means that the Board can uphold a permit so long as the Division had a reasonable basis and substantial evidence to support the approval. The standard also recognizes the expertise of Division, and the Board rightfully grants deference to the Division on technical matters. On appeal, the deference shown to the Division is compounded by the "great deference" that the Utah Supreme Court gives to the Board's review of the Division. *Utah Chapter of the Sierra Club*, 2012 UT 73, ¶11.

The burden of going forward, and the double deference given to the Board and Division, make it quite difficult for a challenger to prevail on its claims. Thus, permittees are protected from abuse simply by the stacked deck nature of the permitting review process itself. Thus to

argue, as Alton does again and again, that a claim is frivolous simply because it failed to win is patently absurd.

***Frivolousness is a very high burden to prove.*** Speaking of burdens, a permittee seeking attorney fees must show "that the subject claims were frivolous." April Board Order re: the Objective Fee Shifting Standard at 2 (Apr. 2, 2015), *attached at* app'x 1. Under the Board's analysis, frivolous is a defined term of art—a frivolous claim is a claim that lacks an arguable basis in law or in fact. *Id.* at 2–3. Inverting that statement of law leads to a simple test: if a claim has any basis in law and any basis in fact, then it is not frivolous. This means that a prima facie showing is not enough; to reach the subjective component of bad faith, Alton must prove by a preponderance of the evidence that each claim lacked one or both elements. Even after a full round of briefing on the matter, however, the legal standard for fee shifting is well worth explaining through example because *basis in law* and *basis in fact* are themselves terms of art.

The first controlling example comes from the Supreme Court case of *Neitzke v. Williams*, 490 U.S. 319 (1989), which the Board identified as a leading example of the frivolousness standard in its recent Order. April Board Order at 3. In *Neitzke*, a prisoner brought two constitutional claims against his jailer under a statute that specifically addresses frivolous litigation. 490 U.S. at 321–22. Like Rule B-15, the prisoner's statute was "designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits." *Id.* at 327.

In his first claim, the prisoner alleged that poor medical care at the jail violated his right against cruel and unusual punishment under the Eighth Amendment. The trial court found the claim to be frivolous because the prisoner failed to meet the high burden of proof demanded under the Eighth Amendment—essentially, the prisoner alleged a case of medical malpractice that fell short of the "deliberate indifference" standard he needed to prove. The Supreme Court disagreed with the trial court and reversed, focusing on the fact that a showing of frivolousness requires that the "petitioner cannot make **any** rational argument" and that factual and legal bases are "**indisputably** absent." *Id.* 322-23 (emphasis added). According to the Court, the prisoner made a rational non-frivolous claim for relief even though the claim was likely to fall short on the merits. *See id.* at 321-23.

In the second claim, the prisoner alleged a violation of his right to due process, claiming to be entitled to a hearing before the warden moved him from one cellhouse to another. *Id.* at 321. On this claim, the Supreme Court agreed with the trial court and held that the due process claim was frivolous. The Court so held "[b]ecause the law is clear that prisoners have no constitutionally protected liberty interest in remaining in a particular wing of the prison." *Id.* at 322.

In sum, *Neitzke* illustrates two distinct prongs of the analysis. The first shows that it is not frivolous to plead a legally cognizable theory, even if the claim is incredibly hard to prove and it is unlikely that the plaintiff can meet the high burden required. The plaintiff still gets the

chance to try. On the other hand, it **is** frivolous to claim a constitutional right where the law is settled and none exists.

The Board also identified two Utah cases in its definition of frivolousness. First, in *Migliore v. Livingston*, plaintiffs filed a renewed motion to set aside a final judgment under Rule 60(b) long after the case was closed. 2015 UT 9, ¶ 16, 347 P. 3d 394. Under Rules 60(b), final judgments can only be set aside under a short list of enumerated circumstances such as fraud, newly discovered evidence, or lack of due process. According to the Utah Supreme Court, the *Migliore* motion was frivolous because the plaintiff provided not a single fact that would satisfy Rule 60(b). Instead, the plaintiff's simply expressed disagreement with the original ruling and provided no legal or factual basis for actually getting the relief requested. *See id.* ¶ 33–34.

Second, in *Warner v. DGM Color*, the Utah Supreme Court addressed claims in a state court proceeding that the plaintiff initiated after a related federal bankruptcy action concluded. 2000 UT 102, 20 P.3d 868. The Court conducted a "review of the relevant bankruptcy law" and found it "clear that plaintiff's ability to assert the claims … were cut off by the bankruptcy proceeding." *Id.* ¶ 22. The record also showed that the plaintiff was aware of, and participated in, the bankruptcy case so he must have known "his only recourse was [] in the federal bankruptcy proceeding." *Id.* The Court awarded fees.

Finally, the Sixth Circuit case *White v. City of Ypsilanti*, No. 96-2414, 1997 WL 705253 (6th Cir. Nov. 4, 1997), illustrates that frivolousness is

always judged as a snapshot in time. In *White*, the plaintiff alleged civil rights violations against police officers. At his own deposition, however, evidence came to light that made it impossible for him to win. Unperturbed, the plaintiff "continued to pursue his claims after his deposition revealed that he could not prevail." *Id.* at *1. The court awarded attorney's fees—but only for the portion of the case that occurred **after** the plaintiff's deposition. *Id.* at *4. Thus, new developments or information that ultimately dictate the outcome of a case do not render the **original** claim frivolous.

## ANALYSIS

The Division agrees with Alton Coal that Sierra Club, et al. oppose coal mining and encourage persons to use "all possible political and legal options to prevent" a mine's operation. But motivation is irrelevant to the initial objective inquiry regarding frivolousness and using all legal means to do something is not bad faith anyway. Anti-coal views are not evidence that the claims in a Request for Agency Action were frivolous; they are not even evidence of a subjective harassing purpose.

Approval of a mining permit, Board review of the decision, and judicial review of the Board are all designed to allow—and encourage—the public to take part in the administrative process under the Utah Coal Act. That right to take part, and the concomitant right to resolve disputes in a fair and open adjudicative process, is integral to a society based on the rule of law. It is also enshrined in First

Amendment and the Utah Constitution as the right to petition the government. *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 741 (1983) (recognizing a First Amendment right to access administrative Boards for the redress of grievances); *see also* Utah Const. art. I, §§ 1, 11.

In Pennsylvania, one of the most important coal-producing states by volume, the Board explained the danger of charging attorney fees for non-frivolous claims. "[A]ssessing attorney's fees against private individuals and citizens' groups who unsuccessfully challenge Departmental administrative actions will doubtless have a chilling effect on these citizens' constitutional right to bring an appeal." *Alice Water Prot. Ass'n v. Commw. of Pa.*, No. 95-112-R, 1997 EHB 840 (Sept. 17, 1997).

Against that backdrop, the Division presents its analysis of Alton's fee petition. First, the Division offers initial thoughts about the petition. Second, the Division engages with the substance of Alton's fee petition on the seventeen Sierra Club claims. Finally, the Division addresses Alton's four post-litigation claims of frivolousness. Each section alone, and amplified when combined, show that this Board should deny the petition.

## I. Even on its face, Alton's fee petition fails to meet the burden required to award attorney fees.

Alton's assertion that all seventeen of Sierra Club's claims were brought without a reasonable basis in law or fact raises a skeptical

eyebrow.[3] Even a superficial examination reveals that Alton cannot be right on all of them. Most obviously, claim twelve—whether the water monitoring plan needed an explanation of how the data would be used—received the support of a dissenting board member who endorsed Sierra Club's argument. Interim Order Concerning Disposition of Claims at 22–25 (Aug. 3, 2010) [hereinafter Board's Interim Order], *attached at* app'x 2. Unless Alton seriously means to argue that Board Member Payne was somehow convinced by an argument despite a complete lack of legal and factual bases, then claim twelve was not frivolous. Making such a baffling argument on this claim severely weakens the creditability of the rest of Alton's analysis.

In addition, Alton's across-the-board claim of frivolousness includes at least seven claims that survived the Division's Motion to Dismiss and Alton's two Motions for Partial Summary Judgement (which the Board treated as motions to dismiss).[4,5] *E.g.*, Division's

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[3] Indeed, the overbroad challenge on all seventeen issues identified for hearing ignores an important fact: that Sierra Club initially alleged thirty-seven permitting errors by the Division, but then selected only seventeen of those claims to pursue. This winnowing of the claims—by more than half—strongly suggests that Sierra Club did not just conjure every possible claim to stop the mine; rather Sierra Club only pursued the claims that were best supported by law and facts.

[4] Counting claims is a difficult proposition in this case because individual claims often overlap. As such, both the parties and Board often address issues together. These numbers represent the Division's best correlation of given arguments to the enumerated claims that Alton pleaded in its fee petition.

[5] Alton's second Motion for Partial Summary Judgment addressed all the hydrology issues. The Division can find no record that it was ever resolved.

Motion to Dismiss Certain Claims (Jan. 13, 2010), *attached at* app'x 3; Alton Coal's Motion and Memorandum in Support of Partial Summary Judgement (Jan. 19, 2010), *attached at* app'x 4. The fact that all seven claims survived dispositive motions causes two serious problems for Alton's current fee petition.

First, frivolous claims rarely survive motions to dismiss. Even under Utah's relaxed pleading standards, an issue gets dismissed any time the petitioner "fails to state a claim upon which relief can be granted." Utah R. Civ. P. 12(b)(6). Although it is technically possible to state a claim that survives a motion to dismiss and is simultaneously frivolous, that scenario is the exception, not the rule. Indeed, courts use survival of dispositive motions as evidence that a claim had merit. For instance in South Dakota, "the fact that plaintiff's claims initially survived a motion to dismiss may be sufficiently suggestive of merit to justify a conclusion that plaintiffs' claims are not frivolous even though the claims are ultimately not successful." *Pucket v. Hot Springs Sch. Dist. No. 23-2*, No. 03-5033, 2008 WL 4862383, at *1 (D.S.D. Nov. 10, 2008).

Stated differently, if the petitioner raised an issue significant enough to require a hearing or further briefing, then it generally follows that the underlying claim was not frivolous. As the Eleventh Circuit stated, "a plaintiff's claim should not be considered groundless or without foundation for the purpose of awarding fees to a prevailing defendant when the claims are meritorious enough to receive careful attention and review." *Walker v. NationsBank of Florida N.A.*, 53 F.3d

1548, 1559 (11th Cir. 1995). This rationale is supported by the Supreme Court's declaration that even claims that **do** get dismissed are not necessarily frivolous. *Hughes v. Rowe*, 449 U.S. 5, 15 (1980) ("The fact that a prisoner's complaint, even when liberally construed, cannot survive a motion to dismiss does not, without more, entitle the defendant to attorney's fees.")

In this case, the dispositive briefs by both sides fully explored the legal arguments and the facts that addressed seven claims. The Board reviewed those pleadings back in 2010 and declined to dismiss even a single one. According to the Board, many of Sierra Club's claims were weak, but they were meritorious enough to receive careful attention and review at a full hearing. *See, e.g.*, Order Concerning Motions to Dismiss at 3 (Feb. 18, 2010), *attached at* app'x 5.

Alton's current fee petition, then, asks the Board for a second guessing, which the Supreme Court advises against. "[I]t is important that a district court resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 421–22 (1978). The Tenth Circuit likewise warned that applications of hindsight are inappropriate and "smack[] of 'Monday morning quarterbacking.'" *F.D.I.C. v. Schuchmann*, 319 F.3d 1247, 1252 (10th Cir. 2003) (quoting the Fifth Circuit).

Second, the fact that Alton only moved for partial summary judgment is telling. If all the claims were frivolous, then surely it would be prudent to move for summary judgment on all of them, not just a select group. That Alton did not pursue all seventeen explains a lot about their merits assessment of those missing claims. For example in *Schuchmann*, like on the other ten claims here, the defendant "did not file a timely motion for summary judgment." 319 F.3d 1247, 1252 (10th Cir. 2003). Although such a motion is not strictly required, the court found "[defendant's] failure to [file] casts doubt on her assertion that the [] claims were completely without merit." *Id.* If a claim is strong enough that even the defendant does not file for dismissal, then that claim is probably not frivolous.

Lastly, Alton attempts to change the playing field by arguing that they need only present "**prima facie evidence** of objective bad faith" for the Board to allow discovery.[6] Opening Brief in Support of Fee Petition and Commencement of Discovery at 5 (June 8, 2015) [hereafter "Alton's Opening Brief"]. To support that assertion, Alton relies on one footnote from the Board's November 3, 2014 Supplemental Order. However, this attempt to rewind the proceedings to last year fails because it ignores a full round of substantive briefing that took place

[6] *Prima facie* means "at first sight," so prima facie evidence is enough evidence to raise a presumption at first examination. As any presumption can be rebutted by contrary evidence, prima facie is a low standard and is markedly different than other evidentiary standards. *Black's Law Dictionary* 1382 (10th ed. 2014).

afterwards. Indeed, in that same November Order, the Board requested the very round of briefing that Alton now ignores to help it determine the proper standard to apply under Rule B-15. After weighing the arguments and analysis presented, the Board rejected Alton's current argument. April Board Order at 3, app'x 1.

The April Order supersedes the earlier one and forecloses Alton's argument that prima facie evidence is enough. In it, the Board made clear that the Alton's current briefing was not part of an initial stage where prima facie evidence would suffice. On that point, the Board required Alton Coal to make "a showing that the subject claims were frivolous." *Id.* at 2. The verb "show" means to make facts apparent or clear by evidence, and is a synonym for "prove." *Black's Law Dictionary* 1591 (10th ed. 2014). As prima facie evidence is remarkably less than proof, Alton's contention that prima facie evidence is enough to move forward cannot stand.

Further, the Board told Alton exactly what it wanted from further briefing: "The Board directs Alton to file a brief which identifies which of the Sierra Club's underlying claims Alton contends were frivolous. This brief shall address each such claim individually and set forth *all arguments* in support of Alton's contentions regarding frivolousness." April Board Order at 3 (emphasis added). The Board also indicated that it preferred to "commence this briefing on the merits now." *Id.* at 3, n. 1. The Board's direction to Alton was clear. Alton bears the burden of enumerating each claim, marshaling all the facts and all the

law that supported **and** contradicted the claim, and then proving to the Board that each was so completely deficient as to completely lack any basis in law or fact.

In its current Opening Brief, Alton did not conduct any of the marshalling required to satisfy the burden of proof. By failing to head the Board's direction, Alton apparently hopes that the Board will undertake its own thorough review and marshal the facts and law *sua sponte*. But fee shifting is not about re-engaging in long-dead litigation. As the Supreme Court admonished, "We emphasize, as we have before, that the determination of fees should not result in a second major litigation." *Fox v. Vice*, 131 S. Ct. 2205, 2216 (2011) (quotation removed). The Court continued that the fee applicant must meet "the burden of establishing entitlement to an award[;] trial courts need not, and indeed should not, become green-eyeshade accountants." *Id.* (quotation removed).

Here, the petition for fees fails to meet Alton's burden and needlessly burdens the Board with re-examining factual claims and arguments that it already considered and rejected. These three points show that Alton's latest brief fails to meet the burden required, and the Board should deny the fee petition on that basis alone.

## II. Individually, each of Alton's assessments fall well short of proof and the Division advises that none meet the standard of frivolousness.

Even if the Division's initial points were not enough, Alton's numbered items also fail individually and the Division turns to them now.

**Claim 1: Whether the Division's determination of eligibility and effect related to cultural and historic resources covered the entire permit area.**

The allegation by Sierra Club in claim 1 was somewhat unusual as pleaded because the issue evolved during the proceedings. This claim was not among the original deficiencies listed in the Request for Agency Action (RAA, *attached at* app'x 8), and was not included in the pre-hearing motions. However, Sierra Club identified it as a claim for the hearing.

The cultural surveys for the mine permit area had been completed by a consultant for Alton as part of the work required for the permit and also for a federal coal lease application. The federal coal proposed to be leased surrounded the privately owned coal that was included in the permit application. There were a series of cultural resource surveys completed and included in separate reports. Each survey covered separate parcels of land and were completed and submitted on differing dates. Ultimately the surveys identified 81 sites (all of which were camp areas or lithic scatter sites and none of which involved buildings or other structures).

After the issue 1 was identified, and while Alton and the Division were in the middle of reviewing the surveys when preparing for depositions, Alton discovered that two sites within the permit area had been overlooked and not included in the initial permit application. Shortly before the merits hearing, the Division submitted information identifying these omitted sites to the State Historic Preservation Officer (SHPO) and obtained the necessary concurrences. The mitigation required for the missing sites was added as a condition to the permit in accordance with a provision in the coal regulations that allows conditioning a permit on mitigation of subsequently discovered cultural or historic resources.[7]

To determine if this claim was frivolous, the first question is whether there was sufficient evidence at the time the issue was raised. Sierra Club presented no evidence of any **specific** errors regarding this obligation in its RAA. However, under the standards applicable to pleadings, a party only needs to be "likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Utah R. Civ. P. 11(b)(3).

In this case there was enough uncertainty for Sierra Club to make this claim even without any particular evidence of an error, due to the

[7] Sierra Club asserted that this claim—resulting in the modified permit which protected of these sites—was a basis for Sierra Club's own recovery of attorney fees based on the lower standard for citizen plaintiffs. The Board stayed resolution of this fee claim pending the ongoing appeal, and Sierra Club subsequently withdrew the claim. This withdrawn claim for Sierra Club's fees is now among the claims that Alton seeks to recover fees on.

lack of public information regarding the surveys and sites, the existence of multiple surveys, and the need to rely on experts to determine compliance. As borne out by the inadvertent failure of Alton to identify two sites, the information to demonstrate compliance was not simple to obtain or interpret. If the provisions allowing for citizen groups to challenge a permit decision are to be meaningful, it is reasonable to allow a party to make a claim subject to an opportunity to examine information that requires technical expertise or access to non-public records.

After amendment of the permit, Sierra Club argued that the Board should not have approved the permit as modified, but rather should have found that the permit was not properly approved. There was no dispute among Alton, Sierra Club and the Division about the legal basis for Sierra Club's claim: the applicant is required to identify all of the sites within the permit area that might be eligible, to determine their eligibility for listing, and to obtain the SHPO's concurrence regarding the determination of eligibility and effect, and the proposed mitigating actions **prior to** approval of the permit.

The facts demonstrate that, at the time of the initial approval of the permit, Sierra Club's allegation that the cultural resource compliance did not include the entire permit area was true since cultural sites within the permit area had not been identified in the application and had not been submitted to the SHPO. Sierra Club's pursuit of this claim after the modification of the permit was based on an argument

that the permit approval was unlawful at the time it was **originally** approved. Which, had the Division not modified the permit, would have been true.

Alton submits that there is no basis for this argument because the rules allow for the amendment of a permit to identify cultural resources and therefore it was never **unlawful** for the Division to approve a permit that was deficient because it could always be modified after the fact. Alton's Opening Brief at 8. Sierra Club's argument that approval of a permit necessitates a finding that all of the requirements for the permit are met was reasonable. Obtaining cultural resource clearance is a specific finding required by Utah Admin. Code R645-300-133.600 and R645-301-411.140 to -411.144. As originally approved, the permit contained no conditions regarding later-discovered sites. It was not an unreasonable legal position to argue that Division's approval was not based an adequate cultural clearance of the permit area **when issued**, and should have been remanded for modification.

Ultimately the Board ruled simply that it "upholds the Division's approval of the permit conditioned by the requirement to avoid or mitigate the newly identified sites." Board's Interim Order at 3.

**Claim 2: Whether the Division's determination of eligibility and effect related to cultural and historic resources covered any area outside the permit area approved for the Coal Hollow Mine; and**

**Claim 3: Whether the Division considered a mitigation plan for any cultural or historic resources located wholly outside of the permit area.** [8]

These claims were not included in the RAA as filed, which only addressed the alleged failure to consider impacts to the Panquitch National Historic District (PHND). There were not any deficiencies alleged (in the original RAA) regarding cultural sites surrounding the permit area. The meaning of adjacent area was included in the briefing of motions to dismiss, but did not address the possible omission of cultural sites near the permit.

Only when Sierra Club identified the final claims for hearing were these issues presented. As with claim 1, it does not appear that there was a particularized factual basis for the claims; rather they may have been set out as a way to confront the PNHD issue.

The Sierra Club did not present a witness on these claims, but proceeded by contesting the testimony of the Division's witness. In the post hearing briefing, Sierra Club argued that the Division had not designated an "adjacent area" for cultural resources, something the Division did do with regard to the alluvial valley floor claim. Petitioner's Post-Hearing Brief Addressing Air Quality and Cultural/Historic Issues at 10 (May 13, 2010) [hereinafter Sierra Club's Post-Hearing Brief I], *attached at* app'x 6. Sierra Club argued that one

[8] These two claims were addressed together by the Board in its Interim Order. Alton's Opening Brief in Support of Fee Petition states Claim 3 is subsumed within Claims 1, 2 and 4 and that it would not address the Claim further. Alton's Opening Brief at 16.

interpretation of Rule 645-301-411 would requires a map of an "adjacent area" to show where cultural sites should be identified. Sierra Club relied on evidence that none of the correspondence with the SHPO included any discussion of the adjacent area, that no site wholly outside of the permit area was included in the identification and consideration presented to the SHPO, and that the SHPO had refused to confirm that the "adjacent area" had been considered. Sierra Club's Post-Hearing Brief I at 13–15.

The Division argued that the it had complied with the requirement to investigate the impact on sites in an adjacent area because Alton had completed a cultural survey of *all* the surrounding lands and that *all sites* that were partially within the area to be mined had been identified and the effect of mining considered. It was further argued that since all identified sites were only lithic scatters, only direct surface disturbance would have an adverse impact. Therefore, the Division argued that any site wholly outside of the permit area would not be affected by mining operations and were not in an "adjacent area" as that term is defined in rule.[9]

The Board agreed with the Division that Alton had surveyed an area large enough to cover any possible adjacent area, and agreed that only sites directly impacted by mining actions would be affected.

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[9] "An area where resources . . . are or reasonably could be expected to be adversely impacted . . by coal mining and reclamation operations." Utah Admin. Code R645-100-200.

Board's Interim Order at 4–5. The Utah Supreme Court upheld this interpretation of adjacent area as consistent with the plain meaning of the rule and therefore upheld the Division's method of satisfying the requirement.

Contrary to Alton's current argument, there was no disagreement over what the statute and rules said. The question was whether the Division had complied with those requirements. Sierra Club argued that the Division's analysis was a *post hoc* justification for a failure to identify an adjacent area, and therefore an error in the permit application, that should have resulted in the permit decision being reversed. This argument was supported factually, based on the lack of discussion in the correspondence with SHPO and a lack of documentation in the application. An explanation at the hearing was needed to clarify that this requirement had been met. That the Board accepted the Division's explanation does not mean the underlying claim was frivolous.

Sierra Club's arguments in claims 2 and 3 were incorporated into claim 4. In claim 4, Sierra Club argued that the adjacent area should have included the Panquitch National Historic District (PHND). The reasonableness of claim 2 and 3 also depends on the arguable factual and legal basis for claim 4. In other words, if there is an arguable factual and legal basis for including the PNHD in an adjacent area, then the claims that the division failed to provide the cultural clearance for any adjacent area outside of the permit area was also arguable.

**Claim 4: Whether the Division was required to identify and address the effect of the proposed Coal Hollow Mine on the Panguitch National Historic District before approving the mine permit.**

This claim was one of the original deficits cited in the RAA. The inclusion of this claim was based on the existence of the PNHD, requests by public officials and citizens that the impacts be studied as part of the EIS for the requested federal coal lease, and consequent studies by the Division and Alton of the possible impacts as part of the cultural resource study. In addition, the factual basis included allegations in the public comments to the EIS that coal truck traffic would damage the nature of the historic district and businesses, and possibly the buildings in the PNHD. Petitioner's Memorandum in Opposition to Division's Motion to Dismiss Certain Claims and Alton Coal Development LLC's Second Motion for Partial Summary Judgment at 4–11 (Jan. 25, 2010) [hereinafter Sierra Club's Opposition to Motion to Dismiss], *attached at* app'x 7.

Legally, this claim was based on a broad reading of the applicable law including the definitions of coal mining operations, adjacent area, and affected area. The Sierra Club cited case law from other jurisdictions, holding that impacts associated with coal hauling (even on some public roads) must be considered as part of the permit analysis of impacts on adjacent areas. Sierra Club's Opposition to Motion to Dismiss at 9–10.

The Sierra Club's Opposition to the Motion to Dismiss makes several arguments for inclusion of these impacts in the permit decision.

Sierra Club raised the obligations within the rules to take into account the effect of the proposed permit on properties eligible for listing on the National Register for Historic Places as required by SMCRA and on public parks under Rule 645-300-133.600, as well as its argument based on the definition of the adjacent area. *Id.* at 4–11. There was evidence of some initial confusion in the permit review documents due to the Division investigations of potential impacts. There was also confusion because the term "affected area," which is defined in SMCRA, is also defined in the National Historic Preservation Act (and the NHPA's definition applied to the mine through the federal coal lease, which more broadly considers indirect impacts of a project).

The definition of "affected area" in SMCRA had been subject to litigation and struck down. A letter of agreement had been adopted in place of the definition that established criteria for determining if a public road used for coal hauling would be considered coal mining. *See* Utah Admin. Code R645-100-200. Sierra Club also argued that the Utah Historic Preservation Act, Utah Code § 9-8-404, required consideration of the impacts on the PNHD because the state statute should follow the same rules as its federal counterpart (the National Historic Preservation Act). Those federal rules arguably would have required consideration of indirect impacts.

As noted earlier, the Board declined to dismiss any claims after reviewing the Division's Motion to Dismiss and Alton's companion Motion for Partial Summary Judgement. Thus, the Board determined

that the claims were strong enough to deserve a full and fair hearing even though the Board was skeptical that Sierra Club could prevail.

Ultimately, Sierra Club's argument did fail. Sierra Club was not able to convince the Board of its legal position that coal hauling on *this* public road at *this* distance from the mine was regulated coal mining operations or that the adjacent area included the PNHD. Board's Interim Order at 6–7. Consequently the "adjacent area" analysis did not require studies of areas adjacent to the public road used to haul coal. *Id.* at 7. In addition, Sierra Club failed to connect the cultural resource impact reviews required under the Utah Historic Preservation Act and the EIS with any regulatory authority of the Division to address or mitigate such impacts. *Id.* This was a novel position without opposing authority.

The protection of the PNHD was a highly public concern at the time. The legal argument that the State Historic Preservation Act should use the federal rules and consider indirect impacts also failed but was not a position without any legal basis. The public concern regarding this issue is exactly the type of citizen participation the Coal Act encourages. As Sierra Club argued in its Memorandum opposing the Motion to Dismiss, even if the exemptions for public roads were found to be applicable, the claim still requires a factual inquiry that justified a hearing. Sierra Club's Opposition to Motion to Dismiss at 11.

**Claim 5: Whether the Division determined that the Fugitive Dust control Plan for the Coal Hollow Mine met the requirements of the Division's regulations prior to approving the mine permit.**

**Claim 6: Whether the Division of Air Quality provided the Division of Oil, Gas and Mining an evaluation of the Fugitive Dust Control Plan for the Coal Hollow Mine prior to the Division's approval of the mine permit.**

**Claim 7: Whether the Division of Air Quality has provided notice to the Division of Oil, Gas, and Mining of receipt of a complete air permit application from Alton Coal for the Coal Hollow Mine.**

**Claim 8: Whether the Division of Air Quality has provided notice to the Division of Oil, Gas and mining of approval of an air permit for the Coal Hollow Mine.**

**Claim 9: Whether the Division was required to wait for the Division of Air Quality's evaluation of the Fugitive Dust Control Plan including the plans effectiveness in addressing the quality of the night skies before approving the mine.**

These five issues as worded above were not included in the RAA as filed. However, the RAA's list of deficiencies did include: a failure to include an air quality monitoring program that provides sufficient data to evaluate the effectiveness of its fugitive dust practices; and (2) failure to contain any analysis of the mine's operation on the clarity of the night sky. RAA at 26–27, *attached at* app'x 8. Both issues were subject to the Division's Motion to Dismiss and Alton's Motion for Partial Summary Judgment. The Board declined to dismiss these claims, supporting the contention that the Board has already found that they were supported by an arguable legal basis.

As worded above, the facts assumed in claims 5, 6, 7, and 8 were not directly controverted. That is, there was no evidence provided **until after the hearing** that the Division of Air Quality (DAQ) had

provided the Division with an evaluation of the Fugitive Dust Control Plan, had provided the Division a receipt of a complete air permit application, or had approved an air quality permit. Declaration of Dana Dean (June 23, 2010). Without these approvals, the fugitive dust plan was also not yet approved. Thus, these four claims were not factually contested.

The only issue that precluded Sierra Club's success on these four issues was the argument that the Division could defer these required findings to another agency and to a later time. Whether Sierra Club's claim was frivolous as to these four claims depends on whether there was a reasonable factual and legal basis for the argument that approval of the Dust Control Plan could be not be conditionally deferred until after the permit approval with deference given to another agency.

Sierra Club argued that the regulations prohibit approval of the permit without a "complete and sufficient fugitive dust control plan" including a monitoring program. Petitioner's Opposition to Alton Coal Development LLC's Motion for Partial Summary Judgment on Cultural/Historic and Air Quality Issues at 19 (April 22, 2010) [hereafter "Sierra Club's Opposition to ACD's Motion for PSJ"] ; and Sierra Club's Post-Hearing Brief I at 4-5. The Division argued that it could approve the permit subject to approval by DWQ of the monitoring program based on an existing memorandum of understanding with DAQ, its obligation to cooperate with DAQ, and the permit condition that DAQ's approval was required prior to the

start of mining activity. Division's Post-Hearing Memorandum Regarding Petitioners' Air Quality and Cultural Resource Claims at 5–6) [hereafter "Division's Post-Hearing Memorandum"].

Even if the air quality issues could be conditioned and deferred to DAQ, the Sierra Club argued that the permit could not be approved since the proposed method for monitoring had not been shown to be effective. Sierra Club argued that this EPA Method 9 was designed for plumes from stationary sources and was not adequate for this purpose. Sierra Club's Opposition to Motion to Dismiss at 13.

The Interim Order on these issues did not find that the Sierra Club's claim was baseless. Rather, the Board found that due to other factors such as a requirement in the regulations to coordinate with the DAQ, a Memorandum of Understanding with DAQ, and its expertise, the Board "cannot conclude that the Division's means chosen by the Division to assure itself of the effectiveness of the monitoring element of the dust control plan was unreasonable." Board's Interim Order at 9, app'x 2. It further found that no harm would occur since no mining could occur until a plan had been approved. *Id.* at 9–10. Thus as to Claims 5, 6, 7, and 8, there was a factual basis for each of the claims and a legal argument for the claims founded in the regulations.

In their Opening Brief, Alton argues that Sierra Club's failure to present any evidence to support their assertion that the monitoring plan was not adequate was evidence the claim was frivolous. Yet that burden was on Alton at the permit application phase, not on Sierra

Club at the hearing phase. Alton argues that the Division presented an expert on air quality to support their claim that the fugitive control plan was adequate and that there was no evidence presented to contradict this evidence. Alton's Opening Brief at 20. But the soil scientist testified that she did not have the expertise to evaluate the air quality monitoring program and that was why the matter had been deferred to the DAQ. Rough Trans. 100: 16-23. Sierra Club did have an arguable basis for its claim that Method 9 may not work: it alleged it was designed for stationary plumes not fugitive dust and this assertion was not shown to be baseless. Sierra Club's Opposition to Motion to Dismiss at 13.

**Claim 9: Whether the Division was required to wait for the Division of Air Quality's evaluation of the Fugitive Dust Control Plan including the plans effectiveness in addressing the quality of the night skies before approving the mine.**

As presented by Sierra Club, this issue was tied to the prior four issues. Was it premature for the Division to issue the permit before determine if the fugitive dust control plan would be effective in addressing the quality of the night skies? As analyzed by the Board and as argued by the Division and Alton, the issue was modified slightly by arguing that the DAQ approval was not relevant since there was no duty to protect the quality of the night skies.

Sierra Club relied on the same factual allegations for this claim as for the prior four, together with evidence of numerous requests from officials at the surrounding National Parks to address this issue before

approving the permit. The Division's response was that the only regulatory powers were the benefits that might be the consequence of meeting the federal and state air quality standards. The legal basis asserted by Sierra Club in their Opposition to the Motion to Dismiss was that R645-301-244.100 requires effective control of erosion and air pollution attendant to erosion.

Although this is indirect and weak as authority to require protecting night sky visibility, it is arguable. In addition, Sierra Club argued that assuring that the fugitive dust control plan would be effective to meet federal and state air quality standards also might protect night sky clarity. Sierra Club failed to present any evidence that there could be impacts from mining activities on night time visibility. The proffered factual basis consisted only of statements of concern and of requests for study of the effect of the mine on clarity of night skies. Given the weak legal basis for the claim it could be argued that this claim was frivolous.

However, this is also a claim that was not dismissed on the Division's motion, and the Board therefore found the claim not to be frivolous as plead and to deserve a hearing. As worded, the claim is supported by the undisputed fact that there had been no determination that the monitoring method was effective to demonstrate that the fugitive dust plan would meet air quality standards and therefore it was premature to approve the permit. Sierra Club's evidence failed to

connect fugitive dust control and air quality standards with night sky clarity.

As with the PNHD claim, this claim arose out of public concern and it can be argued, on that basis alone, that it deserved a hearing to satisfy the public's concerns. It is relevant that this issue was not appealed to the Utah Supreme Court.

**Claim 10: Whether the Division's Cumulative Hydrologic Impact Assessment ("CHIA") for the Coal Hollow Mine unlawfully fails to establish at least one material damage criterion for each water quality or quantity characteristics that the Division requires Alton to monitor during the operations and reclamation period.**

Alton lumps claims 10 and 11 together in its analysis of whether the claims are frivolous. They provide two paragraphs of analysis for both issues. In the first paragraph they restate the issues and in the second paragraph they state that the both claims were frivolous "because they were rooted in non-binding guidance rather than statute or rule." Alton's Opening Brief at 22. Alton asserts that this conclusion is supported by the rulings of the Board that there was "no provision or controlling statute or regulations [that] imposed the requirement Petitioners alleged was illegally violated." *Id.* (quoting Ex. H, ¶¶166-68). Alton asserts that the Supreme Court's decision confirmed that the claims were frivolous, because it found "they were unsupported by statute or rule." Alton's Opening Brief at 23. Obviously, the Court made no inquiry into whether the claim was frivolous.

In addition, this statement mischaracterizes the Board's decision. A more careful reading of the Interim Order reveals that the Board acknowledges a legal obligation to determine the probable impact of mining on the hydrologic balance, and to make a finding that the mine has been designed to prevent material damage to the hydrologic balance outside of the permit area. Board's Interim Order at 11. In support of its claim that this cannot be done without establishing material damage criterion for each water quality and quantity

characteristic of concern, the Sierra Club relied in part on a guidance document prepared by the Office of Surface Mining. This document did explain how to establish material damage criterion and how to use them to make a finding that the mine has been designed to prevent material damage to the hydrologic balance outside of the permit area.

The Board did not rule that the guidelines were non-binding and did not rule that Sierra Club's claim was without any basis. Instead, the Board's finding on this issue looked to the requirements for a CHIA and gave deference to the Division's findings "that the CHIA complies with the regulations and that the mine has been designed to prevent material damage to the hydrologic balance." Board's Interim Order at 12.

In its briefing of this issue, Sierra Club did not rely solely on the Guidelines. It argued that the CHIA as written failed to meet the requirements of the statute and rules. The Guidelines were presented as argument in support of this position. Sierra Club's position was that Alton had failed to show how it otherwise could have sufficient criteria to make the required finding. This issue was covered by prehearing briefs and post hearing briefs by all parties, and at hearing by the testimony of three expert witnesses. Sierra Club and Alton cited cases dealing with material damage criteria, and the interpretation of the statutes and rules. Both the legal and technical arguments were detailed and complex.

Experts for the Division, Alton and the Sierra Club all testified about how the Guidelines were or should be used by the Division to prepare a CHIA. They agreed that the guidelines were non-binding, but all agreed that they were generally helpful and that they were or should be used in making the CHIA. However, the experts did not agree on what the Guidelines required or how to apply it. As the Board noted in its Interim Order with regard to claim 10: "[it] heard testimony from the expert witnesses of the parties concerning the choices made and analysis undertaken by the Division in performing its CHIA. The Board views the witnesses of the Division and ACD to be more credible overall on this subject than the witness of the Petitioners and finds that at most the testimony of the Petitioners establishes a mere difference of opinion on an issue involving substantial technical analysis … . Evidence that demonstrates only a difference of professional opinion between Petitioners' expert and the Division's expert does not demonstrate error on the part of the Division or warrant reversal or remand." Board's Interim Order at 11–12.

This explanation by the Board of its reasoning does not indicate that Sierra Club's reliance on the Guidelines was even error, let alone frivolous. Rather, it indicated that it considered the factual and legal basis for the claims presented by Sierra Club, as creditable but ultimately not persuasive.

As a final note on this point, counsel for the Sierra Club and its expert witness on the hydrology issues had both previously tried a significant number of cases in which they had raised and argued this (or similar) hydrologic issues. It would be safe to say that they were among the most experienced counsel in the United States with regard to their knowledge concerning SMCRA litigation, the adequacy of CHIAs, and other aspects of coal mine permitting. Division's May Exhibits No. 13 at 2 (May 20, 2010). There was nothing shoddy or haphazard about their preparation for this litigation, the quality of their arguments, or the preparation and testimony of the witness regarding these and other issues.

To reduce the legal and factual arguments and the Board's deliberations regarding these two issues to an assertion that Sierra Club's claim rested entirely on a non-binding guidance document, and therefore was frivolous, discredits the serious consideration and work that was involved in trying these issues by counsel for all parties and the Board.

**Claim 11: Whether the Divisions Cumulative Hydrologic Impact Assessment ("CHIA") for the Coal Hollow Mine unlawfully fails to designate the applicable Utah water quality standards for total dissolve solids (a maximum concentration of 1,200 milligrams per liter) as the material damage criterion for surface water outside the permit area.**

It has already been pointed out that Alton included its analysis of frivolousness for this issue with the prior issue and argued both are frivolous solely because they relied in part on a non-binding guidance

document. As with claim 10, this characterization is not an accurate presentation of Sierra Club's arguments or the decision of the Board.

The Board provided a separate analysis and discussion of the arguments for claim 11 in its Interim Order. In that Order, the Board examined the statute and rules without mention of the Guidelines as being a basis for its decision. Board's Interim Order at 12–13. The issue as framed by Sierra Club was whether the Division's use of 3000 milligrams per liter (mpl) of total dissolved solids (TDS) as an indicator parameter to prevent degradation of the hydrology outside the permit area was reasonable.

Their argument was based on the fact that the Utah water quality standard for TDS is 1200 mpl. This was a reasonable claim because, as Sierra Club argued, Utah law requires that the permit not result in damage to the surrounding streams, and at minimum, be designed to meet the water quality standards. The Division's justification for using the higher TDS level was that background levels routinely exceed the water quality standard and that the higher level was required to determine if the mine is adding to the level of TDS in the stream. Sierra Club, through the testimony of its expert, presented information in the CHIA and other documents attempting to discredit the factual basis for the Division's actions. Thus, there was both a legal and factual basis for the claim.

The Board again sided with the Division's expert and stated "the evidence in the record supports the Division's setting its indicator

parameter at 3,000 milligrams per liter. The testimony of Petitioners' expert on this question only establishes a difference of professional opinion between the expert and the Division's staff on an issue of substantial technical analysis and does not justify disturbing the Division's determination." Board's Interim Order at 12–13. Likewise, the Supreme Court did not base its decision on non-binding guidelines. Instead, it found that the Division properly established a threshold limit higher than normal levels, which could be compared against future samples and evaluate whether water quality levels had deteriorated. This satisfied Utah's statue and the federal regulatory guidelines. *Sierra Club*, 2012 UT 73, ¶ 49. Alton's dismissively brief analysis of whether claims 10 and 11 were frivolous fails to meet the burden required by the Board.

**Claim 12: Whether Alton Coal's hydrologic monitoring plans are unlawfully incomplete because they fail to describe how the monitoring data that Alton Coal will collect may be used to determine the impacts of the Coal Hollow Mine upon the hydrologic balance.**

In its Opening Brief, Alton again fails to marshal the legal arguments and the factual basis underlying this claim. Alton in one paragraph selectively presents language from the Supreme Court's decision, in which it dismissed Sierra Club's reliance on the preamble to a proposed federal rule. The Court noted that the rule was never adopted and was not authority for requiring a narrative describing how the monitoring plan would be used to determine impacts. Alton

argued that the Court's finding that this rule was never adopted is conclusive evidence that the claim was frivolous. Alton's Opening Brief at 23.

This cursory level of analysis is useless for determining frivolousness. The Court of course never examined the claim to see if it was frivolous or made such a statement. The parties in the Board hearing and in arguments to the Court disagreed over the degree to which federal regulations and commentary on federal rules had legally binding effect on the Board in its application of Utah law. On this question, the Division had prevailed before the Board, and therefore the Supreme Court's comment was merely dicta. The Board had already determined that the preamble was at most a non-binding commentary providing useful suggestions. In any event, neither the Court, the Board, nor Sierra Club relied solely on the preamble of this rule for its arguments and analysis.

Importantly, the preamble was not even mentioned in Sierra Club's post hearing briefing of the issue. Rather, Sierra Club argued that the plain language of the rule required explanation as to "how" the plan would be used. Sierra Club presented an unpublished administrative decision addressing this issue and used it to argue that a detailed narrative was required.

It was clear that the description in Alton's mine monitoring plan explaining "how" the monitoring data would be used was very brief. To offset this potential deficiency, the Division argued that the Board

should look to the other provisions in the permit application to explain how the data would be used. The Board adopted this position. However, Sierra Club's argument—that the rule language should be interpreted to require this explanation as part of the monitoring plan—was tenable. With respect to this interpretation, the Board found that the regulations did not "shed further light on the degree of detail required' and "[a]lthough a more detailed description may be used, a majority of the Board is not persuaded that the rule has been violated." Board's Interim Order at 13.

If there was still any question on this issue, the written dissent of Board Member Payne in the Interim Order shows thoughtful and thorough consideration of Sierra Club's legal and factual arguments. It is apparent from the dissent that the factual and legal basis for Sierra Club's claim were not just arguable, but persuasive to him. The inclusion of this claim by Alton as a one that was frivolous undermines the creditability for Alton's entire analysis and reasoning for the other allegedly frivolous claims.

**Claim 13. Whether Alton Coal's hydrologic operating plan is unlawfully incomplete because it fails to include remedial measures that Alton Coal proposed to take if monitoring data show trends toward one or more material damage criteria.** (emphasis added)

Alton argues that this claim is frivolous "because there was no reasonable legal basis to assert that **monitoring plans** must articulate remedial measures triggered by trends in monitoring data." Alton's Opening Brief at 24. That may or may not be true, but of course there is

a pretty significant difference between a **monitoring plan** (Alton's argument about frivolousness) and an **operating plan** (Sierra Club's original claim). So it is not clear how Alton could succeed on this.

But regardless, Alton provides no analysis of the arguments made and the applicable law. They merely repeat the self-serving statements from the findings of fact that Alton itself prepared for the Board's signature. And naturally, Alton's recited findings of fact and conclusions of law did not (and were never meant to) consider if Sierra Club's arguments had any factual or legal basis.

In contrast, the Board acknowledges in the Interim Order that there is a potential legal basis for the claim by citing Utah Administrative Code R645-301-728 (Probable Hydrologic Consequences), and -731 (Operational Plan requirements). The Board also acknowledges that the claim, as argued after the hearing, specifically addressed the issue of preventing excessive levels of TDS, the problem discussed in claim 11 above. The Board discusses Sierra Club's arguments and finds rather than that there is no obligation, that the regulations afford the Division a measure of discretion in determining the degree to which an applicant must include remedial measures. Thus there is a legal obligation, but the Board found that the Division had satisfied that regulation because it was reasonable to conclude that there was not a likelihood of rising TDS levels.

Sierra Club also argued that the measures provided in the operating plan were only preventative measures, not remedial. The

Board considered this argument too, and found that the Operating Plan did identify measures which were both preventative and remedial. Thus, Sierra Club's claim as analyzed by the Board included both an arguable factual and legal basis sufficient to warrant the Board's examination of the rules and the Operating Plan. The Board's conclusion was that the Division's determination (that the facts did not justify the plan including remedial action addressing possible increases in TDS) was reasonable and, therefore, a specific measure addressing TDS was not required. The Board did not determine that the regulations might not have legally required such a remedial action if the Division determined that the facts had justified it.

Once again the Division's expertise was given deference. It was not frivolous for the Sierra Club to believe otherwise based on the evidence that there were already high levels of TDS in the receiving waters and the reasonable expectation that mining might add TDS from the disturbed areas.

**Claim 14: Whether Alton Coal's geologic information is unlawfully incomplete because Alton Coal Failed to drill deeply enough to identify the first aquifer below the Smirl coal seam that may be adversely affected by mining.**

Both Alton and Sierra Club agree on the legal basis for this claim: the obligation to drill into the deeper of either the stratum immediately below the lowest coal seam to be mined or to any aquifer below the lowest coal seam which may be adversely impacted by mining. Utah Admin. Code R645-301-624.200.

Whether this claim is frivolous turns on whether there was a factual basis for Sierra Club's argument that Alton was required to drill into the Dakota Formation to a sufficient depth to show that there was no aquifer or until it reached the aquifer. Sierra Club claimed that there was substantial evidence of a potential aquifer below the coal seam in the Dakota Formation that may be adversely impacted by mining. Alton, conversely, argued that no likely-to-be-affected aquifer existed and that its sampling of the formation immediately below the coal strata satisfied the requirement. Alton's Opening Brief at 25.

Sierra Club presented expert testimony. Its witness stated that Alton had drilled only five holes below the coal: two holes to depths of two feet; two holes to a depth of four feet; and one hole to seven feet below the coal. Their witness claimed that most of these holes were only drilled into an underlying clay layer that was claimed to be burn associated with coal deposits. The expert claimed that there were two seeps and one spring (SP-4) in the immediate area that emanated from the Dakota Formation. In addition, the witness relied on geologic literature to support the claim that the Dakota consisted of sandstone at a two-to-one ratio and that it had "potential for groundwater in sandstone aquifers." Finally, the Sierra Club cited to a 1988 determination regarding a prior mine permit application where it was determined that at the Dakota Formation may be an aquifer. See Sierra Club's Post-Hearing Brief II at 53–65.

Sierra Club then presented evidence that, if there was an aquifer present, it could be adversely impacted using testimony from the Division that fractures from blasting, release of pressure from mining, or water saturation resulting from mining might allow for contamination of an aquifer (if one existed). Based on this information, Sierra Club argued that the Division's approval was improper because it had not required enough information about an aquifer which may be impacted.

Short of actual drilling records, Sierra Club appears to have an arguable factual basis for claiming that Alton had not complied with the rule, and that the Division's approval was improper without more information. The legal claim is based on a parsing of the words "may be affected" and it involves applying "may" to both the reasonableness of impact and the reasonableness of there being an aquifer. This was a reasonable argument that did not succeed.

The Board found that the Division's expert had in addition to the other information, examined outcrops of the Dakota formation, and that he did not agree with the geologic literature and data reported. He instead testified that he found the Dakota formation was not likely to be an aquifer. Board's Interim Order at 16–18. The Board concluded that there was a "mere difference of opinion as to what the inquiry requires" and that difference of opinion was not enough to disturb the Division's determination. Board's Interim Order at 16–18. The Board's finding—that experts can disagree—again granted deference to the

Division and requires the conclusion that there was a reasonable basis in law and fact for the claim. This claim was not frivolous.

**Claim 15: Whether ACD's hydrologic monitoring plans are unlawfully incomplete because they fail to establish monitoring stations for surface water and alluvial ground water in or adjacent to Robinson Creek.**

Claim 15 and claim 16 were both evaluated together in Alton's Opening Brief. The Board in its Interim Decision addressed the issues separately as did Sierra Club in a post hearing Brief. Petitioner's Post-Hearing Brief on Geology and Hydrology Issues Together with Petitioner's Response to the Board Concerning the Effect of Air Quality Permit Proceedings at 44 (June 24, 2010) [hereinafter Sierra Club's Post-Hering Brief II], *attached at* app'x 9. This issue was not pursued in the appeal to the Utah Supreme Court.

Sierra Club did argue that there should be monitoring wells at the permit boundaries, however this was not the entirety of their argument. *Id.* The legal under-pining was that the monitoring locations on Lower Robinson Creek were required to be at locations that would allow the Division to determine the effects of the coal mining operation on water quality within and outside of the permit area as required by R645-301-731. This legal obligation was not disputed or questioned.

Sierra Club made two claims of error: (1) that the approved permit monitoring locations that were located at substantial distances from the permit boundaries would not provide accurate and effective data used to meet this obligation; and (2) the locations should be at the

permit boundaries. The second argument was asserted at the hearing and briefed but was not included as this issue was pleaded. To succeed on either issue would have been a win for Sierra Club.

Sierra Club's closing brief identified the facts supporting this legal claim that were presented by their expert witness at the hearing: (1) the upstream location was 0.88 miles above the permit boundary and included additional drainage from a 0.53 sq. mile area; (2) the downstream location was 0.75 miles below the permit boundary and included 0.39 sq. miles of additional drainage area; and (3) the portion of the down-stream drainage between the permit boundary and the monitoring station included areas of contributing flow from an irrigated field, from identified seeps and showed potential ground water gain. It was argued that these facts would prevent the selected sites from being useful for accurately determining the effect of mining on the hydrologic balance outside of the permit area. Given the relatively small size of the permit (less than a mile where the stream crosses) and the very low amount of flow, it was at least arguable to claim that these monitoring locations were too remote from the mine operations, and would create sufficient errors in the monitoring data, to preclude accurately determining the impact of mining on the hydrologic balance. It was the Sierra Club expert's testimony that it would and that the monitoring program did not meet the requirements of the regulations.

Although the Board found that there was no obligation to monitor at the permit boundary, or at any particular location, they did not find that the Sierra Club's claim was without any legal basis. Rather, the Board's Interim Order acknowledges the requirement to have monitoring locations that will permit evaluation of the mine's impact on the hydrology outside of the permit area, but expressed their opinion that Alton's expert was more creditable on this point and that there was only "a difference of professional and technical opinion as to the siting of the monitoring stations." Board's Interim Order at 19.

This difference of opinion involving substantial technical judgment did not demonstrate error in the Division's finding that the monitoring plan was adequate under the regulations. Thus, the Board acknowledged there were legal and factual bases for the claim. It was just that Sierra Club's facts did not amount to reversible error. The Board again announced that competing views on this technical question were not enough to render the Division's permit approval unreasonable, not that Sierra Club's argument was baseless.

**Claim 16: Whether ACP's baseline hydrologic data are unlawfully incomplete in one or more of the following respects:**
**(a) the data do not include even one flow rate or water qualify entry during the data collections period at monitoring stations that ACD should have established on Lower Robinson Creek immediately upgradient of the permit area, and thus the data do not demonstrate seasonal variations at that location;**
**(b) the data do not include even one flow or water quality entry during the data collection period at a monitoring station that ACD should have established on Lower Robinson Creed immediately**

**downgradient of the most downgradietn discharge point from the seeps or springs that ACD and the Division has observed between monitoring points SW-101 and SW-5, and the data do not demonstrate seasonable variation at that locations; and**
**(c) none of the water quality data are verified by complete laboratory reports that establish an appropriate chain of custody and identify the sampling protocols that governed collection of each water sample.**[10]

The Sierra Club's issues as set forth above were directed at the lack of water quality and quantity data for the upstream water monitoring station on Lower Robinson Creek and lack of data for the two seeps identified on Lower Robinson Creek. The post hearing briefing by Sierra Club focused on the seeps and springs within the permit that were identified in the application as SW-101 and SW-5.

The legal basis for the claim was a Utah Administrative Code rule requiring baseline data that is to include seasonal water quality and quantity information and specific chemical analysis for existing springs and other ground-water resources. Utah Admin. Code R645-301-724.100. This is a different rule than relied on for claim 15. The factual basis was the lack of data in the permit application for these two identified water resources as well as the lack of data upstream from the

[10] Alton notes claim 16(c) was not pursued in the post-hearing briefing. However, the issue was not dropped prior to the hearing. During the hearing the Division corrected some apparent errors in the data and the methods used by the Division to allow direct reporting of testing results was explained. Thus it is arguable that there was an initial basis for Sierra Club's questions about the data including chain of custody and protocols, but those concerns were apparently satisfied at the hearing and the claims withdrawn.

permit boundary on Lower Robinson Creek. Alton's argument only questioned Sierra Club's claim that there was no upstream monitoring location on Lower Robinson Creek. Alton argued that the stream was ephemeral and the zero flow measurements satisfied the rule. Sierra Club argued that this lack of data was error at the hearing. This argument is not without any basis since admittedly a zero flow report does not include the required seasonal and chemical information that is required. Such information for ephemeral streams can be obtained by other sampling methods.[11] The claim of error for this issue was in the alternative and the upstream data issue was not argued in the post hearing brief.

In the post-hearing brief Sierra Club argued that, for the identified seeps, there was not sufficient data despite the evidence of flows at these points. Sierra Club argued as in claim 15 that the monitoring point .75 miles outside of the permit boundary (one-mile downstream from these seeps) would not provide the required water quality and quantity data. Given the clear language in the rule, the identification of these sources of water, and the absence of the full data from these seeps, it is at least arguable that the permit was deficient in the manner identified by their expert, i.e., that the permit lacked the required information.

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[11] For prior coal mining permit applications, flow and water quantity data has been provided for ephemeral streams by use of gages that sample rain and flood events. For example, see the Lila and Smokey Hollow mine applications.

The lack of data for these seeps was not addressed by Alton in its Opening Brief addressing the alleged frivolous claims. Rather the opening Brief characterizes the Sierra Club's "entire factual argument" as being "based upon arguing that 'a dry hillside' might contribute a hydrologic-balance-altering amount of water to a creek where virtually all prior measurements were zero." Alton's Opening Brief at 27, (emphasis in original).

This statement misrepresents the facts (the seeps at issue **were** identified and sampled) and the arguments (that monitoring downstream one-mile does not provide adequate data and meet the rule). Alton's characterization also fails to accurately state the legal basis for the claim, namely that the rule requires the application to include data on water quantity and quality for "existing springs and other ground-water resources," not just those that may contribute a hydrologic-balance altering amount of water." Utah Admin. Code R645-301-724.100.

Alton's expert expressed his view that the data from the monitoring station one mile away met the rule's requirements and that the identified seeps were not significant and relevant to the mine's potential impact. The Board did not address the lack of data on the two identified seeps, but rather found the Division's exercise of its technical judgment (approving of the baseline data) was reasonable. Referring to claim 15, the Board ruled that the ACD-selected "monitoring site locations [were] chosen to allow for the collection of data required by

the rules and the Division in the exercise of its technical judgment agreed. The contrary opinion of [Sierra Club's] expert does not alone support disturbing the Division's findings on this issue." Board's Interim Order at 20. Thus the decision was based on deferring to the Division's judgment and expertise, rather than dismissing the claim as being without basis in fact or law.

**Claim 17: Whether the Division's determination the Sink Valley does not contain an alluvial valley floor is arbitrary, capricious or otherwise inconsistent with applicable law.**

This issue was the subject of a substantial portion of the hearing and each party presented expert witnesses testimony. The issue of whether a portion of the mine permit area included an alluvial valley floor (AVF) was important because an entirely different set of regulations apply to AVFs. Thus an AVF finding would require remanding the permit to the Division for an whole new review and approval process, which would result in substantially delay (or possibly denial) of the permit application.

This issue was difficult for the Division due to a prior determination—an earlier mine application in 1988 resulted in a determination that the mined the area was an alluvial valley floor. The Division staff was not all of one mind, and made numerous visits to the site prior to making its final decision. The Division ultimately reversed its previous finding from the previous permitting process.

The AVF requires analysis of myriad factors related to hydrology, geology and biology. The Board in its Interim Order sets out the two

conflicting legal arguments presented by Sierra Club and the Division. In one section of the regulations dedicated to the requirements applicable to alluvial valley floors,[12] the requirements and criteria to be used to determine if there is an alluvial valley floor are set out. This section of the regulations does not include any requirement to examine the geology to exclude certain types of lands based on land type. Based on these criteria, the Division found sufficient water and potential agricultural use to say that the criteria had been met. However, the definition of an alluvial valley floor at R645-100-200 excludes from the definition any lands that were typically uplands from an AVF. The Board concluded that the Division did not err "in looking to the regulatory definition of an AVF found in Section 200 in making its AVF determination for Sink Valley." Board's Interim Order at 21–22.

Sierra Club argued in its post hearing brief that the definition as applied by the Division had the effect of negating the very determination that was required by the regulations, that the criteria were more specific and should control, and that the criteria are more consistent with the general purposes controlling mining in an AVF. The Board did acknowledge and wrestled with each of these arguments but ultimately sided with the Division. The fact that the Division already made a contrary determination that the mine area

[12] R654-302-321.300 to -321.323

was in fact an AVF it itself strong evidence that there was a legal and factual basis for Sierra Club's claim of error.

## III. Alton's additional claims of frivolousness likewise fail to meet the burden required and fail to persuade.

Alton for the first time in its Opening Brief identifies as frivolous procedural actions that Sierra Club elected to take within the hearing process and actions taken at the conclusion of the hearing process to protect its legal rights. These claims require a different sort of calculus than those that were direct challenges to the permit decision. Sierra Club is entitled to file a claim if it is not frivolous because we encourage resolution of disputes by adjudication. But Sierra Club is entitled to ask for assurances that there is an impartial board regardless of justification because that is among the protections an adjudicatory system includes. There is not a separate burden that must be met to get a fair trial or to ask for a stay or an appeal of a decision. Those are rights that come with the right to adjudicate a good faith claim.

### A. Petitions' Motion to Recuse Board Members

With regard to this procedural claim, there was neither a requirement nor a reason for Alton to make any response. It was the Board that dealt with the questions about the potential conflicts of one of its members. The amount of Alton's attorney time involved, if any, was minimal and unnecessary. The claim for fees on this issue, which did not involve Alton nor have any financial consequences for Alton, suggests a motivation beyond attorney fees.

In addition, the Division's letter of April 12, 2010 shows that there was a question about the legal standard for recusal that depended on the type of board and that for this Board there was at least a question about the potential for a direct conflict of the Board member. The Board considered the facts disclosed by the Board Member and determined that there was not a direct conflict of interest.

**B. Motion for a Stay**

Alton points out that the Motion for Stay was over-length, not well drafted, cited an incorrect rule, and failed to include the findings of fact and conclusions of law. This is not a standard for frivolousness. It is not unusual, in the case seeking to prevent environmental harm, to seek a stay. The purpose of a stay is to preserve the status quo since environmental damage is an irreparable harm, and irreparable harm is one criteria for a stay. Sierra Club made this argument in its motion for Temporary Relief. It was not frivolous to claim that they would succeed on the merits as that is the stance generally taken at the beginning of any appeal.

**C. Petition seeking an award of expenses and fees**

This issue has been addressed in claim 1 discussion. The factual basis was the discovery of the inadvertent omission of two cultural sites from the protections required by the Act. Sierra Club argued that filing the RAA led to the discovery of the site omissions. The legal basis for their fees claim was Rule B-15 itself (and associated case law) that liberally award fees to parties who further the purposes of a

statute. These arguments are clearly stated in Sierra Club's petition for fees, but Alton does not address them in its Opening Brief. There was a non-frivolous basis for asserting the claim.

In addition, this matter was brought against the Division, not Alton. It was also quickly stayed pending the resolution of the Supreme Court appeal. And then, Sierra Club withdrew it. It is hard to see how Alton would be entitled to fees for litigation that did not concern it and there is little reason for raising this claim now except to make Sierra Club appear duplicitous.

**D. Petition for extraordinary relief**

This was a problem of Alton's own making that resulted from its continued efforts to conduct discovery. It was not frivolous for Sierra Club to use the available rules of civil and appellate procedure for relief, and they did so. Alton, in leveling this claim, is not just attacking Sierra Club's appellate counsel; they are also attacking a distinguished Utah attorney who has been President and Managing Director of a prominent Utah firm for nineteen years. Given that Sierra Club's petition for relief on this matter was well drafted, sophisticated, legally and factually thorough, and required a sixteen-page response from Alton, it is plainly outrageous to suggest that it was frivolous.

## CONCLUSION

Alton Coal and the Division won this case on the merits back in 2012. Now, some three years later, Alton's Opening Brief attempts to turn that win into a windfall by recouping the costs of their permit defense. But defending a permit is part of having a permit, and Alton's main contention—that all of Sierra Club's claims are rejected by now-settled law—does not acknowledge that it was this very litigation that settled it.

Under the American rule of attorney fees, parties pay their own litigation costs unless the other side is way out of line. Proving that requires showing that a given claim was frivolous, lacking any legal or factual basis. Unless Alton can meet that substantial burden, they must pay the costs of their own defense, no matter how significant those costs may be.

Here, Alton failed to carry its burden for the reasons stated above. Even if some of Sierra Club's original claims pushed the factual or legal envelope, the Supreme Court advises that "The essential goal in shifting fees … is to do rough justice, not to achieve auditing perfection." *Fox v. Vice*, 563 S.Ct. at 2216. Rough justice in this case means that the Board should deny Alton's fee petition.

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## CERTIFICATE OF SERVICE

I certify that I delivered a copy of the Division of Oil, Gas and Mining's Response Brief re: Alton Coal's Petition for Attorney Fees to the following parties by email on August 19, 2015:

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